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No. 90-761

in the Supreme Court of the United States

October Term, 1990

In re Holywell Corporation, Theodore B. Gould, Miami Center Limited Partnership, Chopin Associates and Miami Center Corporation,

Debtors.

Chopin Associates, *et al.*,

Petitioners,

vs.

Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, *et al.*,

Respondents.

BRIEF OF FRED STANTON SMITH, TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petition for Writ of Certiorari should be denied where no conflict among the Circuit Courts of Appeals exists and no important question of federal law is raised as a result of the Eleventh Circuit Court of Appeals' affirmance of the bankruptcy court's approval of a settlement of *ad valorem* tax obligations of the Miami Center Liquidating Trust?

PARTIES TO THE PROCEEDINGS

DEBTOR-PETITIONERS

Chopin Associates, acting by debtors Theodore B. Gould and Miami Center Corporation,* its partners, and Miami Center Limited Partnership, acting by debtors Theodore B. Gould and Miami Center Corporation, its general partners

RESPONDENTS

Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust
Herbert Stettin, as escrow agent
S. Harvey Ziegler, as escrow agent
The Bank of New York
City National Bank of Florida, as trustee of Land Trust no. 5008793, Dade County, Florida
Joel Robbins, as Property Appraiser of Dade County, Florida
Fred Ganz, as Tax Collector of Dade County, Florida
Randall Miller, as Executive Director of the Florida Department of Revenue

COURTS

Judge Sidney M. Weaver of the United States Bankruptcy Court for the Southern District of Florida
Judge C. Clyde Atkins of the United States District Court for the Southern District of Florida
Judges Tjoflat, Fay and Hoffman** of the United States Court of Appeals for the Eleventh Circuit

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*Miami Center Corporation is a wholly owned subsidiary of Debtor Holywell Corporation.

**Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

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OPINIONS BELOW

The opinions relevant to the Petition for Writ of Certiorari are the Order Approving Amended Settlement of *Ad Valorem* Tax Claims entered by the United States Bankruptcy Court for the Southern District of Florida on November 18, 1988, App. L at 72;[1] the Order Affirming Bankruptcy Court's Order Approving Amended Settlement of *Ad Valorem* Tax Claims entered by the United States District Court for the Southern District of Florida on July 6, 1989, App. G at 34; and the *per curiam* affirmance of the bankruptcy court's decision entered by the United States Court of Appeals for the Eleventh Circuit on August 14, 1990, App. F at 32.

STATEMENT OF JURISDICTION

The Petitioners seek review of the Eleventh Circuit's August 14, 1990 affirmance of the bankruptcy court's November 18, 1988 order approving a settlement of *ad valorem* property tax claims. The Petitioners have failed to establish any jurisdictional basis for granting the Petition for Writ of Certiorari. They have not demonstrated the existence of a conflict among the United States Courts of Appeals nor an important question of federal law which has not been, but should be settled by this Court. *See* Sup.Ct.R. 10.1(a)–(c).

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[1]References to the Petitioners' appendix will be by the symbol "App. ____." References to the appendix attached hereto will be by the symbol "Liquidating Trustee's App. ____."

STATEMENT OF THE CASE

The Petitioners are two of five related Debtors[2] who filed voluntary Chapter 11 petitions over five years ago in the United States Bankruptcy Court for the Southern District of Florida. This is their eighth attempt at review in this Court.[3]

In this petition, the Petitioners seek review of an order of the Eleventh Circuit Court of Appeals affirming the bankruptcy court's approval of a settlement of Dade County, Florida's *ad valorem* tax claims against the Miami Center. App. F. at 32 and L at 72. The Miami Center is a hotel, office, shopping and parking complex in Miami, Florida developed by the Petitioners and their Co-Debtors in the early 1980s, the foreclosure of which precipitated the Debtors' August 1984 voluntary Chapter 11 petitions. When they filed Chapter 11, the Debtors owed over $350 million to over 400 creditors, with their most significant creditor being the Bank of New York (hereinafter "bank").

In August 1985, one year after the Debtors sought protection in the bankruptcy court, the court confirmed a plan of reorganization. Its central features were:

(a) substantive consolidation of the five Debtors;

(b) creation of the Miami Center Liquidating Trust, which consisted of, *inter alia*, all of the Debtors' assets as defined by Bankruptcy Code Section 541(a), the

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[2]The Petitioner-Debtors are Chopin Associates and Miami Center Liquidating Partnership, which in turn are related to and/or controlled by Debtors Theodore B. Gould, Miami Center Corporation and Holywell Corporation.

[3]Of the other seven petitions, six have been denied and one, filed in October, 1990, is pending decision.

Miami Center, and *pending litigation*, including the *ad valorem* tax lawsuits then pending in state court;

(c) appointment of a Liquidating Trustee to implement the plan;[4]

(d) the purchase of the Miami Center by the bank for $255.6 million, free and clear of liens, which figure was paid by the cancellation of the Debtors' obligations to the bank (approximately $242 million), plus new cash of $13.6 million;

(e) the bank's release of approximately $30 million in cash collateral to the Liquidating Trustee for payment of claims; and

(f) subordination of Debtor-affiliated claims to Class 8 and subordination of the Debtors' claims to Class 9 under the plan.

The Debtors' appeal of the bankruptcy court's August 8, 1985 confirmation of the plan was unsuccessful. *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed sub nom, Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). When the Debtors failed to post a supersedeas bond, the plan was implemented on October 10, 1985 with the sale of the Miami Center to the Bank of New York. The plan has since been substantially consummated. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d at 1552, 1554–55.

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[4]Fred Stanton Smith was appointed trustee of the Miami Center Liquidating Trust on August 12, 1985 after confirmation of the plan. No party appealed this order.

As of the date of closing on the sale of the Miami Center to the Bank of New York, there remained pending in the state court a number of *ad valorem* tax protest suits initiated by the Debtors for each year dating back to 1979.

The Petitioners assert that Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust (hereinafter "Liquidating Trustee") was not a party to the state court *ad valorem* tax protest suits pending at confirmation of the plan. Under the plan, however, he stepped into the Debtors' shoes and acquired their rights concerning those cases.

The plan and the closing documents from the sale of the Miami Center required the Liquidating Trustee to escrow a portion of the sale proceeds sufficient to pay the disputed *ad valorem* taxes.[5] App. G. at 35–36. An escrow was established in 1985 with the Liquidating Trustee's then counsel, Holland & Knight, and negotiations for settlement continued. Thereafter, Herbert Stettin became the Liquidating Trustee's attorney and, on February 4, 1988, the bankruptcy court named Herbert Stettin and the bank's attorney, S. Harvey Ziegler, as substitute escrow agents of the fund previously held by Holland & Knight.[6]

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[5]The Petitioners argue that the plan required the taxes to be paid at the closing, and that the post-confirmation modification to the plan, which provided for the escrow of monies for the payment of *ad valorem* taxes, was improper. This modification did not violate the Bankruptcy Code in any way. In any event, the Petitioners can hardly argue in good faith that the trust was harmed by the escrow of monies for the payment of *ad valorem* taxes as the escrow permitted the continuation of the *ad valorem* tax protest suits, which resulted in substantial savings to the Liquidating Trust. Prior to this modification, the plan required the Liquidating Trustee to pay the taxes upon closing of the sale of the Miami Center.

[6]The Debtors' appealed this order to the district court, which dismissed the appeal, *Holywell Corp. v. Smith*, No. 88–0628 slip op. (S.D. Fla. January 30, 1989). The Debtors argued that the bankruptcy court

(Footnote continued on next page)

On March 1, 1988, two and one-half years after confirmation and several weeks before the Liquidating Trustee initially sought the court's approval of the tax settlement, the Debtors filed an adversary complaint in the bankruptcy court in which they sought by declaratory decree the same relief they later sought in their objections to the settlement: that is, to have the *ad valorem* tax claims of Dade County stricken based on the county's failure to file proofs of claim in the Chapter 11 proceedings. App. H at 45. Prior to filing this adversary complaint, the Debtors had actively participated in settlement negotiations with the county concerning payment of the *ad valorem* taxes. The bankruptcy court dismissed the adversary complaint on November 18, 1988 after approving the tax settlement. *Chopin Associates v. Smith*, No. 88–0117 slip op. (Bankr. S.D. Fla. November 18, 1988); App. L at 82.

On March 23, 1988, the Liquidating Trustee filed a motion in the bankruptcy court seeking approval of a settlement of the *ad valorem* property taxes. App. I at 59. Although the bankruptcy court indicated that it would approve the terms of the compromise in general, it denied the motion without prejudice because the compromise required the Miami Center Liquidating Trust to pay post-petition interest on the tax debt.

(Footnote continued from previous page)
lacked jurisdiction to approve the transfer of the escrowed funds because confirmation of the plan terminated the bankruptcy proceedings. The court found "this argument completely without merit", based on 11 U.S.C. Section 945, Bankruptcy Rule 3020(d) and the plan's reservation of jurisdiction. *Id.* at 2. The Debtors then appealed to the Eleventh Circuit, which also dismissed the appeal, *Holywell Corp. v. Smith*, No. 89–5165 slip op. (11th Cir. November 1, 1989). In addition to naming Stettin and Ziegler escrow agents, the order determined that the funds held in escrow were specifically set aside to pay the *ad valorem* property taxes on the Miami Center.

On October 4, 1988, the Liquidating Trustee entered into a new settlement agreement with Dade County and the Bank of New York which did not require the Liquidating Trustee to pay post-petition interest. App. K at 68. It was more financially favorable to the Liquidating Trust.

At the October 31, 1988 hearing on the Liquidating Trustee's motion for approval of the amended tax settlement, the Liquidating Trustee requested the court to take judicial notice of all of the testimony, exhibits and arguments presented at the April 28, 1988 hearing. No party objected and the court granted the motion.

At that April 28, 1988 hearing, the bankruptcy court heard testimony from John Fletcher, an attorney specializing in *ad valorem* tax matters. He testified without contradiction that the burden of proof in *ad valorem* tax disputes in Florida is upon the taxpayer to prove, to the exclusion of every reasonable hypothesis of value used by the tax assessor (using recognized methods of valuation), that there was an error in the assessment. He said that is an exceedingly difficult burden of proof to sustain. Liquidating Trustee's App. A at 1–2. He also testified that, given the actual sale of the property in October, 1985 for $255.6 million, together with an MAI appraisal for that amount, the difficulties in the tax protest litigation facing the Liquidating Trustee were obvious. *Id* at 3.

A.H. Blake, the former tax assessor for Dade County and an expert in *ad valorem* tax matters, testified that the settlement was fair, reasonable and in the best interests of the trust. *Id.* at 4–5. The Liquidating Trustee, who is himself an experienced businessman and real estate broker, testified the settlement was in the best interest of the trust because it would (a) terminate the multiple tax protest lawsuits pending in state court, (b) prevent exposure of the trust to judgments in favor of the county for substantially more than

the settlement agreement, (c) preserve to the Debtors the right to pursue their claim that the county is time-barred for failure to file a proof of claim, and (d) terminate the attorneys' fees and costs involved in litigating the state court tax actions. *Id.* at 8–9.

Frank Jacobs, the assistant property appraiser for Dade County, testified that the county was aware of the risks at issue and that the settlement agreement was in no way structured to favor the Bank of New York over the turst. *Id.* at 12.

The bankruptcy court also heard testimony from Debtor Theodore B. Gould regarding the alleged interest of St. Joe Paper Company to a tax refund. In 1979, the Debtors purchased the unimproved property on which the Miami Center was built from St. Joe Paper Company. Mr. Gould conceded that he could not produce any written agreement concerning a continuing ownership interest of St. Joe Paper Company to a tax refund for overpayment of 1979 *ad valorem* property taxes. *Id.* at 13–16. While one of the tax protest suits was in the name of St. Joe Paper Company, the company had given Mr. Gould full authority to pursue the matter and both the bankruptcy court and the district court found there was no evidence that St. Joe Paper Company had any continuing interest in a tax refund. App. G. at 40; L at 75–76.

In its Order approving Amended Settlement of *Ad Valorem* Tax Claims, the bankruptcy court found that the issue regarding tax years 1979 through 1981 concerned refunds based on claims of over-assessment. The court further found that, in exchange for the Liquidating Trustee's waiver of his claim for refunds for tax years 1979–81, the county waived its claims for additional taxes for the Metro-Dade People Mover (public transportation) and other special assessments. App. L at 76.

The bankruptcy court further found that the issue regarding 1983 taxes was whether the office building at the Miami Center was substantially completed as of January 1, 1983, the date of valuation. The county conceded, for purposes of the settlement, that the building was not substantially completed, and the bankruptcy court found that this concession resulted in considerable savings to the trust. *Id.*

The bankruptcy court also noted the dispute for tax years 1984 and 1985 concerned the reasonableness of the assessment of the property. The court found the settlement adjusted the assessments for those years greatly in favor of the trust (by some $90 million), particularly for 1985, the year the Bank of New York's designee purchased the property for $255.6 million, a price consistent with an MAI appraisal of the property. *Id.*

In approving the settlement, the bankruptcy court took into account the fact that the trust would avoid exposure of substantial additional tax and interest, and would receive between $400,000 and $500,000 back from the Bank of New York, representing a reproration of the 1985 taxes taken as a credit by the bank at the closing on the sale of the Miami Center. As part of the settlement the bank agreed to pay interest to the trust on this reprorated sum. *Id.* at 78–79.

The bankruptcy court expressly noted that the amended settlement did not require the trust to pay post-petition, pre-confirmation interest on the sums due the county as the original settlement proposal did, and that the trust would therefore pay $3,320,883.07 instead of $3,430,753.97, which was the original settlement sum. The Liquidating Trust agreed this sum would draw interest in favor of Dade County from April 1, 1988 until paid. *Id.* Almost double this amount had been placed in escrow in 1985 to pay these taxes.

The bankruptcy court "recognized the complexity of all of the issues involved, the length of time required to resolve all of these issues, the expense involved in resolving all of these issues, the uncertainty of result, and the potential devastating effect an adverse ruling would have upon the liquidating trust and its ability to pay claims to creditors and return the surplus to debtors." *Id.* at 81. The bankruptcy court further determined that the settlement agreement is an "exercise of business judgment which appears to the [c]ourt to be sound, reasonable and practical. It recognizes a large savings in tax to the liquidating trust, it permits the debtor, by appeal only, to continue its attempt to invalidate the tax claims in their entirety . . . and it assists in the orderly completion of the work to be done in ending this case." *Id.* The bankruptcy court approved the settlement agreement and the Debtors appealed.

The district court affirmed the bankruptcy court's approval of the settlement, noting that the "bankruptcy court conducted a searching *Jackson* [*In the Matter of Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980)] inquiry, and it approved the proposal only after the proceedings yielded a welter of evidence bearing on the propriety of the settlement." App. G at 38.

The Eleventh Circuit affirmed on August 14, 1990, in a brief opinion:

> The bankruptcy court had the authority to consider the settlement reached between the parties and Dade County concerning questions surrounding outstanding ad valorem property taxes and did not abuse its discretion in approving the settlement.
>
> AFFIRMED.

App. F at 33. This Petition for Writ of Certiorari followed.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied. The Petitioners attempt to create conflicts among the Circuit Courts of Appeals where none exist. They also claim there is an important question of federal law concerning the necessity of filing proofs of claims in bankruptcy proceedings. There is none and they failed to raise this issue adequately below. The Liquidating Trustee's position concerning the uncertainty in the law because of the failure of the county to file a proof of claim is that it was a further incentive to settle. In any event, the Eleventh Circuit's application of *Matter of Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980) in determining whether to approve the compromise was entirely proper. It was not applied inconsistently or in derogation of *Matter of AWECO, Inc.*, 725 F.2d 293 (5th Cir.), *cert. denied*, 469 U.S. 880 (1984) or *In re American Reserve Corp.*, 841 F.2d 159 (7th Cir. 1987), as the Petitioners contend. Any claimed inconsistency is entirely manufactured and does not warrant the granting of the Petition for Writ of Certiorari.

ARGUMENT

I.

THE PETITIONERS HAVE FAILED TO ESTABLISH ANY BASIS FOR THIS COURT'S CERTIORARI JURISDICTION

The Petitioners have not met any of the recognized grounds governing review by certiorari as set forth in Rule 10 of the Supreme Court Rules. The considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered." Sup.Ct.R. 10.1. The Petitioners have failed to demonstrate that they meet any of the established criteria. *See* Sup.Ct.R. 10.1 (a)-(c).

A.

The Bankruptcy Court Properly Applied the Recognized Standards for Approving Settlements in Bankruptcy Proceedings

The Petitioners' contention that the bankruptcy court's application of the standards utilized by courts in approving settlements in bankruptcy proceedings conflicts with the Fifth Circuit's decision in *Matter of AWECO, Inc.* and the Seventh Circuit's decision in *In re American Reserve Corp.* is without merit. The bankruptcy court's application of these standards, set forth in *Matter of Jackson Brewing Co.*, was entirely proper and consistent with *AWECO* and *American Reserve.*

In determining whether to approve a compromise, the bankruptcy court "must compare the terms of the compromise with the likely rewards of litigation." *Protective Committee for Independent Stockholders of T.M.T. Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 425, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1, 10 (1968); *In re Jackson Brewing Co.*, 624 F.2d at 607. The court must evaluate the probable "success in litigation, *with due consideration for the uncertainty in fact and law.*" *Id.* (emphasis supplied). The court must also consider the complexity, duration, and expense of litigation, as well as "all of the factors bearing on the wisdom of the compromise." *Id.* The Debtors have failed to prove the bankruptcy court abused its discretion in applying these standards.

1. Uncertainty of the law

The Petitioners argue that the bankruptcy court could not approve any settlement of *ad valorem* property taxes without first determining whether the county's failure to file proofs of claim for pre-petition tax obligations precludes the county's right to receive payment of any taxes, citing

AWECO and *American Reserve*. This argument is without merit, for one of the primary reasons for settling was because of the uncertainty of the law governing whether the county had a duty to file proofs of claims. In paragraph 21 of the bankruptcy court's order, the court specifically considered "the uncertainty of result and the potential devastating effect an adverse ruling would have upon the liquidating trust and its ability to pay claims to creditors and return the surplus to the debtors." App. L at 81. The district court also noted the uncertainty of the law surrounding the county's duty to file proofs of claims. The court determined that "[a]t best, then the appellants' argument raises a novel issue of law that has not been decided in this circuit — it hardly proves that the omnibus settlement was unfair, inequitable, or not in the estate's best interests. *Compare In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (11th Cir. 1985) (court addresses distinct question dealing with adequacy of filing)." App. G at 41–42.

The Petitioners cite *In re American Properties, Inc.*, 30 Bankr. 239 (Bankr. D. Kan. 1983), to support their claim that the bankruptcy court erred in approving the settlement because the county failed to file proofs of claim. While that case does stand for the proposition that a non-consensual lienholder must file a proof of claim, 30 Bankr. at 247, the Petitioners have neglected to cite the cases which hold that a non-consensual lienholder is *not* required to file a proof of claim. *See In re Hebert Systems, Inc.*, 61 Bankr. 44 (Bankr. W.D. La. 1986); *In re Atoka Agr. Systems, Inc.*, 39 Bankr. 474 (Bankr. E.D. Va. 1984); *Kinder v. Superior Court of Los Angeles County*, 178 Cal. Rptr. 57, 125 C.A. 3d 308 (Cal. Ct. App. 1981). The Eleventh Circuit has never ruled on this issue. Obviously then the question is uncertain and, as the district court held, "it hardly proves that the omnibus settlement was unfair, inequitable, or not in the estate's best interests." App. G at 41.

Moreover, even if the county was required to file proofs of claims, the Liquidating Trustee would still have to pay the *ad valorem* property taxes in order to convey the Miami Center to the Bank of New York free and clear of all liens, as required by the plan. *See Estate of Lellock v. The Prudential Ins. Co. of America,* 811 F.2d 186, 187–88 (3d Cir. 1987) (lien against property survives discharge of debt). Yet the Petitioners nonetheless argue that approval of the compromise was inconsistent with the Fifth Circuit's *AWECO* decision and the Seventh Circuit's *American Reserve* decision.

In *AWECO*, the issue was "in the period prior to confirmation of a reorganization plan, must the bankruptcy court apply the fair and equitable standard in considering a priority creditor's objections to a settlement?" 725 F.2d at 298. The issue in the instant case was whether, post-confirmation, the bankruptcy court could approve a settlement that was favorable to the trust and where the duty of the county to file a proof of claim in order to protect its right of payment was uncertain.

There are several other important facts which distinguish *AWECO* from this proceeding. In *AWECO*, the settling creditor was a recognized general unsecured creditor and the objecting creditor was secured. In fact, the settlement required the transfer of property to the unsecured creditor that was subject to the secured creditor's claim. In this case, one of the issues was whether Dade County was a priority claimant. The objecting Petitioners are accorded the lowest priority of payment under the confirmed and substantially consummated plan. In this case, the compromise was based in part on the uncertainty of the law of whether Dade County's tax claims were barred, whereas in *AWECO*, all parties acknowledged that the settling creditor was a general unsecured creditor. Further, in *AWECO*, although the plan was filed, it had never been

presented to creditors or submitted to the court for confirmation. In this case, not only was the plan confirmed and substantially consummated, but the plan *required* the Liquidating Trustee to convey the property to the Bank of New York free and clear of the county's tax liens. Clearly then, *AWECO* is inapplicable.

The Petitioners' reliance on *American Reserve* fares no better. In that case, the Seventh Circuit reversed and remanded the bankruptcy court's approval of a $5,000 settlement on a claim of $79,350 for further findings where the bankruptcy court's only findings and conclusions were that the settlement was in the Chapter 7 estate's best interest. 841 F.2d at 161. The court opined that because claims with different priorities have different settlement values, the bankruptcy court should "examine the relative priorities of the contested claim and the estate's other claims." *Id.* As previously stated, in this Chapter 11 case, one of the grounds for settling was to avoid a lengthy and expensive battle on the issue of the county's right to claim taxes after not having filed formal proofs of claims where the law on this question is unsettled, and where the plan nonetheless requires the taxes to be paid. The Seventh Circuit's criticism in *American Reserve* was clearly aimed at the bankruptcy court's failure to make any findings that would demonstrate the exercise of its discretion. 841 F.2d at 162–63.

In their zeal, the Petitioners also fail to address the fact that even though Dade County did not file timely formal proofs of claim, their filings with the court could arguably be deemed an enforceable *informal* proof of claim. *See The Charter Co. v. Dioxin Claimants (In re The Charter Co.)*, 876 F.2d 861, 864–66 (11th Cir. 1989) (In order to constitute an informal proof of claim, document must apprise the court of the existence, nature and amount of claim, and evidence intent to hold the debtor liable); *In re South Atlantic*

Financial Corp., 767 F.2d 814, 817 (11th Cir. 1985); *Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1381-82 (9th Cir. 1985); *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 815 (9th Cir. 1985).

The Petitioners have not demonstrated either the existence of a conflict among the courts of appeals or that the bankruptcy court incorrectly applied the law governing approval of settlements in bankruptcy proceedings.

2. Complexity, duration and expense of litigation

The bankruptcy court also considered the complexity, duration and expense of litigation, and concluded that it was in the best interests of the Miami Center Liquidating Trust to settle rather than to continue to litigate. App. L at 81-82.

3. Wisdom of the compromise

The bankruptcy court likewise considered the factors bearing on the wisdom of the compromise:

> The Court believes it has done so, and it recognizes the benefits which flow to each of the parties involved. The taxing authorities receive a substantial amount of cash and an end to time consuming and expensive litigation on their part. The Bank of New York receives property free of any further claims by the taxing authorities, and the debtors receive a resolution of County tax claims on excellent terms.

App. L at 81-82.

B.

The Bankruptcy Court Had Jurisdiction to Approve the Ad Valorem Tax Compromise

The bankruptcy court, contrary to the Petitioners' claims, had jurisdiction to approve the compromise.

The Debtors' argument that the bankruptcy court lacked jurisdiction to approve the settlement of the state court *ad valorem* property tax lawsuits, while novel, is meritless. The bankruptcy court's jurisdiction to approve a settlement of litigation directly affecting the Miami Center Liquidating Trust is obvious and well settled.

The Debtors' first claim that the bankruptcy court lacked jurisdiction because it granted the Debtors relief from the automatic stay in order to pursue the state court litigation. This argument misconstrues the meaning of relief from the automatic stay.

Relief from the automatic stay to pursue a state court lawsuit does not preclude the parties from settling the matter rather than seeking the state court's final judgment. *Peck v. Jenness*, 7 How. 612 (1849), relied on by the Debtors, does not change the result. *Peck* holds that a court cannot interfere with proceedings in another court of competent jurisdiction. 7 How. at 625. The bankruptcy court did not interfere with the proceedings in the *ad valorem* tax cases. The parties to those lawsuits settled the claims, and then sought the bankruptcy court's approval. Once a settlement proposal is reached the bankruptcy court must determine whether the compromise is in the best interests of the trust. *See In re Matter of Jackson Brewing Co.*; 11 U.S.C. Section 9019. Moreover, public policy favors settlement over lengthy, expensive litigation. *See Chopin Associates v. Smith*, No. 89-0070 slip op. (S.D. Fla. July 6, 1989) (Order

Affirming Bankruptcy Court's Order Approving Amended Settlement of Ad Valorem Tax Claims); App. G at 38.

The Debtors also overlook the fact that the confirmed plan of reorganization provides the bankruptcy court with post-confirmation jurisdiction to enter any order necessary or appropriate to carry out the terms of the plan. *See also* 11 U.S.C. Sections 945, 3020(d). As the plan required payment of the *ad valorem* taxes,[7] the order approving the compromise was well within the bankruptcy court's power.

The Debtors also claim the bankruptcy court lacked authority to approve the settlement reached by the Liquidating Trustee because the Bankruptcy Code does not provide for the appointment of a Liquidating Trustee. Not only do the Debtors ignore the confirmed plan (which provides for the appointment of a liquidating trustee), but they also misconstrue the status of the Liquidating Trustee and the scope of his authority. The Debtors argue that the Liquidating Trustee was appointed without satisfying the statutory requirements of 11 U.S.C. Section 1104(a). Yet this contention ignores the fact that the plan provides for the appointment of a trustee to administer a trust composed of the Debtors' assets. The plan also expressly provides that the Liquidating Trustee is the successor to the Debtors' pending litigation.

Because the Debtors have exhausted whatever rights they had to review the order of confirmation, that plan is the law of the case and the Debtors' contentions are an impermissible and frivolous collateral attack. *See Miami Center Limited Partnership v. Bank of New York.* This plan is binding on the Debtors. *See In re Blanton Smith Corp.*, 81 Bankr. 440 (Bankr. M.D. Tenn. 1987); *In re Sanders*,

[7]The plan required the Liquidating Trustee to convey the Miami Center to the bank's designee free and clear of all liens, including *ad valorem* tax liens.

81 Bankr. 496 (Bankr. W.D. Ark. 1987); *In re Monroe Well Service, Inc.*, 80 Bankr. 324 (Bankr. E.D. Pa. 1987); *In re Jartran, Inc.*, 76 Bankr. 123 (Bankr. N.D. Ill. 1987); *In re St. Louis Freight Lines*, 45 Bankr. 546 (Bankr. E.D. Mich. 1984). The validity of the Liquidating Trustee's appointment, his authority to settle litigation, and the bankruptcy court's post-confirmation jurisdiction are thus firmly established.

C.

The Petitioners' Remaining Arguments are Meritless

The Petitioners' remaining arguments are not only lacking in any recognized factual or legal basis, but are entirely irrelevant for purposes of determining whether certiorari should be granted.

1. Income Taxes

The Petitioners argue that the "purpose of the establishment of an escrow, segregating the funds for the payment of the real property taxes, was . . . to provide a legal basis for the undisputed fact that the liquidating plan did not provide a basis for the payment of income taxes arising from the sale of the insolvent debtor MCLP's property." Petition for Writ of Certiorari at 12–13. (Emphasis and footnotes deleted). The Petitioners further argue that:

> Section 1129(d) provides, in relevant part, that a court may not confirm a plan "if the principal purpose of the plan is the avoidance of taxes," and Section 1129(a)(3) requires that the plan be proposed in good faith and not by any means forbidden by law. The Feasibility Standard, Section 1129(a)(11), required that the bankruptcy court

> assure itself that confirmation of the plan was not likely to be followed by the need for further financial reorganization of the debtors, that reorganization would succeed, and therefore, in accordance with the Bankruptcy Reform Act's legislative history, the debtors' "fresh start" would not be burdened with the responsibility for the payment of income taxes arising from the sale of the insolvent MCLP's property and the United States would not lose taxes which the Internal Revenue Service had not had a reasonable time to collect.
>
> The Eleventh Circuit's opinion that the bankruptcy court did not abuse its discretion in approving the settlement for the payment of disputed real estate taxes for the purpose of discharging statutory liens on the property and that the confirmed plan made no provision for the payment of income taxes arising from the sale of the insolvent debtor MCLP's property precludes the conclusion that the confirmed plan was fair and equitable to the United States.

Petition for Writ of Certiorari at 15–16 (footnotes deleted). This argument is improper and irrelevant.

On September 18, 1990, the Eleventh Circuit held the Miami Center Liquidating Trust was not responsible for filing income tax returns or paying income taxes due, if any, on the sale of the Miami Center and what has been referred to as the Washington properties. *United States v. Smith*, No. 89–5862 slip op. (11th Cir. Sept. 18, 1990). While the Debtors have filed a petition for rehearing *in banc*, the United States has not. The petition for rehearing is pending.

It is remarkable that the Petitioners would seek to circumvent the Eleventh Circuit's authority to rule on the Petitioners' petition for rehearing by arguing as they have in the Petition for Writ of Certiorari. It is even more remarkable that the Petitioners would seek to circumvent the Supreme Court Rules governing petitions for writs of certiorari by arguing the Eleventh Circuit's income tax issue in this proceeding. It is entirely improper.

In addition to being an improper argument, it is irrelevant to the issue before the Court. The Petitioners' argument is apparently in two parts: (1) that the bankruptcy court abused its discretion in approving the *ad valorem* tax settlement because the purpose of the settlement was to discharge statutory liens, and (2) the plan of reorganization should not have been confirmed because the plan did not provide for the payment of allegedly due federal income taxes, thus the plan was not fair and equitable to the United States. In a footnote to the second half of this argument, the Petitioners erroneously contend that the Eleventh Circuit affirmed the district court's reversal of the entire plan of reorganization. Petition for Writ of Certiorari at 16, n. 23. Each of these arguments is wholly baseless.

In response to the first half of this argument, it has been pointed out that the confirmed plan included the Miami Center property as an asset of the Miami Center Liquidating Trust and required the trust to convey the property to the Bank of New York for $255.6 million, *free and clear of liens*. At the time of the conveyance, October 10, 1985, there were pending *ad valorem* tax protest suits concerning the property in state court for each year going back to 1979. Unless modified, the plan would have required the trust to pay these taxes in order to convey the property free and clear of liens. Instead, to the benefit of the trust, the plan was modified to allow the trust to escrow a portion of the sale proceeds for the payment of *ad valorem* taxes so the

trust could pursue the state court tax protest suits and continue settlement negotiations. There was no devious attempt to discharge statutory liens which attached to the property.

In response to the second half of the Petitioners' argument, the Eleventh Circuit has affirmed the bankruptcy court's determination that the trust is not responsible for claimed federal income because (a) the plan does not provide for the payment of such taxes, (b) it would be an unlawful post-confirmation modification to the plan to do otherwise, and (c) 26 U.S.C. Section 6012(b) does not apply to the Miami Center Liquidating Trust. The Eleventh Circuit's opinion is reprinted in the Petitioners' appendix. *See* App. E at 13. While the Petitioners and their Co-Debtors have filed a petition for rehearing *in banc*, the United States has not. In any event, this issue is entirely irrelevant to the issue of whether this Court has jurisdiction to review the Eleventh Circuit's affirmance of the bankruptcy court's approval of the *ad valorem* tax compromise.

Lastly, Petitioners' footnote 23 deserves comment. The Petitioners contend the Eleventh Circuit has recently affirmed the district court's reversal of the bankruptcy court's order confirming the plan. In fact, the Eleventh Circuit dismissed as moot the Petitioners' challenge to the plan of reorganization. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). The district court's opinion to which the Petitioners refer in footnote 23 was *limited* by its own terms to the plan's classification of the claim on a non-debtor, Miami Center Joint Venture. In the Petitioners' effort to argue that this decision is broader than it is, they neglect to supply the Court with a copy of the opinion. A copy of the district's court's decision reversing the priority accorded the claim of Miami Center Joint Venture under the plan is reprinted in

the appendix hereto. *See* Liquidating Trustee's App. B. As a plain reading of this opinion makes clear, the entire plan was not reversed. The Eleventh Circuit's decision dismissing the Debtors' appeal of the order of confirmation is the law of the case. The Petitioners' arguments to the contrary are nothing more than a collateral attack on the confirmed and substantially consummated plan.

CONCLUSION

The Petitioners have entirely failed to demonstrate that this Court has jurisdiction to grant the Petition for Writ of Certiorari. For all of the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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Appendix

INDEX TO APPENDIX

APPENDIX A

Testimony of John Fletcher:

* * *

the taxpayer was represented by Lapidus & Frankel and Richard L. Lapidus.

Q. Do you consider Mr. Lapidus to be a competent assessment lawyer?

A. Yes, sir.

Q. What was the result in that case?

A. In the Hotelrama case, the Third District Court of Appeals determined that taxpayers, even though he felt he had a better valuation method and proved that it was a better valuation method, if we can accept that, lost the case, as long as he failed to carry his burden under the three tests of valuation.

Q. What did the Court establish as the burden imposed upon a taxpayer who contests an assessment of ad valorem taxes?

A. Well, it echoed — I won't say that case established it but it echowed [sic] the burden of proof that has been on the taxpayer for a good number of years.

Q. What is that?

A. What that is is that the taxpayer must show that the assessment is invalid by excluding all reasonable hypotheses of assessments.

Q. Does that mean if the tax assessor can show one basis for the assessment, one reasonable basis, even if there are other more reasonable bases, ten other more reasonable bases, the assessor wins?

A. Basically, yes, and if I could explain, the hypotheses of assessments generally are those appraisal methods that are accepted in the appraisal industry, if that is the right word. Those are the cost approach, the income approach, and the market or comparable sales approach. If the property appraiser has evidence showing that any one of those proves his point, then the taxpayer loses.

Q. I ask you to assume as a fact in this case that in 1985, there were one or more M.A.I. prepared assessments of the property which is the subject of this case.

THE COURT: Do you have any problem with the witness being termed an expert in his field?

MR. MARK: I have no problem with his expertise in this area. I have a problem with the relevance of his testimony to any of the issues before the Court.

THE COURT: Well, let's do one thing at a time.

I will accept him.

MR. STETTIN: Thank you, sir.

BY MR. STETTIN:

Q. I ask you to assume for this question that the property in question was appraised one more time in 1985 by an M.A.I., Charles Failla for one, who found the value of the property to be in excess of $255 million.

I also ask you to assume as a fact in this case that the property was sold pursuant to a confirmed amended plan of reorganization for $255,600,000.

Sir, would either or both of these facts constitute a basis for the tax assessor to use in valuing the property?

A. I would assume that we are talking about a fair market value appraisal by the appraiser and an arm's length transaction in the sale.

Q. I ask you to assume both of those.

A. Under those circumstances, that definitely would be very substantial if the property appraiser were to use that figure.

MR. STETTIN: I have nothing further on direct.

MR. MARK: Robert Mark on behalf of the Miami Center Limited Partnership, one of the parties objecting to the settlement.

* * *

Testimony of A.H. Blake:

MR. STETTIN: I will submit it is.

BY MR. STETTIN:

Q. What instructions did you get from me?

A. Well, what you essentially told me was to see what I can do because this thing is getting out of hand.

Q. What do you mean by getting out of hand?

A. Well, the total potential exposure when I entered the picture to the liquidating trustee was in excess of $10 million, of which almost $3 million was just interest.

THE COURT: I guess the question should be, if Mr. Stettin said that, what he meant by getting out of hand?

BY MR. STETTIN:

Q. What did I mean by getting out of hand?

A. I think we had discussed this as a very real problem because interest was running at the rate of about $78,000 a month.

Q. Were you able to come to a resolution with this preliminary agreement with the Dade County Tax Assessor's Office for a settlement of all of the years?

A. Yes, and I think that it's a very fair one.

* * *

Q. You heard Mr. Mark question John Fletcher before.

Do you know whether the property, that is the Miami Center property, has increased in value in the years 1986 and 1987?

A. No, I do not.

Q. Do you have an appraisal that was made subsequent to that? I don't mean the Failla update, I mean other than that, showing the present value of that property?

A. Yes, sir.

Q. What is the present value pursuant to the most recent appraisal that you know?

A. In June of '87, it was said to be $170 million.

Q. Who was that?

A. Joseph J. Blake & Associates, no relation.

Q. Sir, do you have an opinion as to whether or not the settlement proposed is in the best interest of the estate?

A. Yes, I do, and I think it is.

Q. What is the opinion first?

A. I think it's in the best interest.

Q. Why?

A. To win an ad valorem tax case is pretty near impossible, provided the assessor has done what the law tells him to do. The potential risk here is $10,500,000. The agreed settlement is like $6,140,000. It's a difference of $4.4 million.

It's kind of having — it's kind of knowing when to hold them and when to fold them.

MR. STETTIN: Excuse me for one second, Your Honor.

THE COURT: Certainly.

MR. STETTIN: No further questions.

* * *

THE COURT: Any other questions from this side?

MR. GOULD: No.

THE COURT: These were not introduced?

MR. MARK: I have got my copies.

Your Honor, if you would, I will leave that set with you and I will move them into evidence at the appropriate time.

MR. ZIEGLER: Just a couple questions, Your Honor.

THE COURT: Proceed.

CROSS EXAMINATION

BY MR. ZIEGLER:

Q. Mr. Blake, you have testified about the use of three approaches on reaching the value of property, cost, market and income; is that correct?

A. Yes, sir.

Q. Are these approaches weighted in valuing property dependent upon the individual properties?

In other words, some property it makes more sense to use, to have more heavily weight the cost basis and in some property more heavily weight the income basis?

A. It was pretty much up to the assessor's discretion, provided that he has at least given serious consideration to whichever approach he excludes.

Q. Does the income approach have much weight in a situation where you are dealing with more or less loss? In other words, where you are dealing with the difference between two negative numbers, it lost $5 million in year one, and it only lost $500,000 in

* * *

claim filed?

A. Absolutely not.

Q. Did you agree as part of your settlement discussion that you would agree that you would not raise the objection that no claim had been filed, therefore no right to payment should exist?

A. That is correct.

Q. The County understood that, that Mr. Gould still had the right to raise that issue; isn't that right?

A. Yes.

Q. Were you also made aware of the fact that the County claims interest as part of this settlement amount, they allocate a portion of the monies to interest?

A. Yes.

Q. Did you have discussion with your lawyer concerning whether or not interest was enforceable post-petition against the liquidating trust?

A. Yes.

Q. Did you have a concern about that fact?

* * *

Testimony by Fred Stanton Smith:

liquidating trust.

Q. And if there is more than enough to pay all of the creditors whose claims exist and the administrative expenses, what will happen to the excess?

A. It goes back to the residual interest, Mr. Gould and his group.

Q. How long have you been in the real estate business personally?

A. For 25 years.

Q. What business do you have outside of being the liquidating trustee?

A. I'm president of the Keyes Company.

Q. In your opinion, do you have a very good close familiarity with the taxing authorities in Dade County, tax assessment procedures and the values of real property in Dade County?

A. I do.

Q. Sir, did you make a value judgment as a businessman in this case as to whether or not this settlement was in the best interest of the estate?

A. I did.

Q. What is your opinion?

A. It's my opinion that based upon the costs of litigation, the probability of the failure of the litigation, the disaster to the liquidating trust if we have to pay more money out, which we don't have, and the ability to get money back in order to meet our other obligations, it all became a very good settlement that we should pursue.

Q. Did you ever give any instructions to Mr. Blake or any other representative, Shutts & Bowen or otherwise, concerning whether or not to favor the Bank of New York in any universal settlement, global settlement?

A. I never had a concern concerning the Bank of New York.

Q. Do you believe this settlement favors the Bank of New York over the trust?

MR. MARK: Objection, that is leading. Now we are getting into the heart of the issues.

MR. STETTIN: Why is that misleading: "Do you believe that the settlement favors the Bank of New York over the trust?"

MR. MARK: It calls for a yes or no answer.

MR. STETTIN: But so do most questions, Judge.

THE COURT: Overruled.

MR. MARK: Go ahead.

* * *

BY MR. MARK:

Q. You testified earlier, Mr. Smith, that the monies that remain in escrow after payment of the taxes would be returned to the trust; correct?

A. Right.

Q. Any monies left in the trust after payment of all claims would go to the residual beneficiaries?

A. Correct.

Q. It is a fair statement, then, isn't it, sir, that the less money that the trust has to pay in taxes for these disputed years, the more that will be refunded and the more that — at least the more potential there will be for additional refunds for the beneficiaries?

A. Yes.

Q. Now, it is your testimony, isn't it, sir, that you didn't concern yourself with the deal that the current owners, M.C. holding partners, were making for 1986 and '87, as long as you felt the deal was good for the year '79 through '85?

A. My only concern was were they going to make their settlement because as I understood it, Dade County would only make one global settlement with all parties concurring as to their portion of it, so I was concerned that, yes, the bank did settle but as to what it was or how they settled or what the cost was, was of no concern to me.

Q. They had to agree but you didn't feel as if the amount they agreed to had any influence on the amount the County was going to get from you?

A. That's right.

Q. And yet, sir, wasn't it your understanding that the County was looking for a certain total amount of additional payments to resolve the entire range of taxes for the year '79 through '87?

A. It was my presumption that they were looking for a bulk amount of money that they wanted to get into their tills.

Q. Now, if they were looking for a bulk amount of money, the two parties that were paying that bulk amount of money were the trustees and M.C. holding partners, in effect, the bank group; correct?

A. Right.

Q. If we assume it's a bulk amount of money, isn't it also fair to say, sir, that the more the bank pays, the less the trust pays and vice versa?

A. If that were a correct presumption, that would be true.

* * *

Testimony by Frank Jacobs:

That is not the argument that has been advanced, Judge.

THE COURT: Overruled.

BY MR. KRACHT:

Q. You are familiar?

A. I am familiar with the suggestion, yes.

Q. What is your position with respect to that suggestion?

A. It's very far from the truth.

Q. Are you aware or did you favor the Bank of New York to the expense of the liquidating trust to the detriment of the trust?

A. Absolutely not.

Q. Was it ever suggested to you in your negotiations and in your structuring of the settlement that you give preferential treatment to the '86 and '87 years over the '79 through '85 years?

MR. MARK: Objection, leading. This is argument, Judge.

THE COURT: Sustained.

MR. KRACHT: Your Honor, whether anyone instructed, gave him any of these instructions—

MR. MARK: Objection. This should be another question, the objection was sustained. Ask a question, please, sir.

* * *

Testimony by Theodore B. Gould:

* * *

The legal expenses associated with litigating the refund would be paid back to me first. The residual funds would be divided based upon the prorata interest of St. Joe Paper and myself and the payment of the real estate tax for 1979.

THE COURT: Is there such an arrangement? Is such an agreement in writing?

MR. STETTIN: His testimony was before, Judge, when I interrupted, that it was but he can't find it.

THE COURT: All right.

MR. STETTIN: That is the reason for my question because I have never seen it.

THE COURT: Well, I understand, and I was going to ask the same question, and also the contents relative to, if he is going to institute the suit, does he have the ability and the right to settle the suit.

MR. STETTIN: That is my next question.

THE COURT: Your next question, that was my question. I will listen.

BY MR. STETTIN:

Q. Let me lead up to it this way.

From 1979 when the suit was filed, did you pay the legal expenses?

* * *

A. Well, in fact, the office building earned a profit, an operating profit after the payment of ad valorem taxes but before debt service for all of those years.

MR. STETTIN: Thank you, sir.

CROSS EXAMINATION

BY MR. ZIEGLER:

Q. Mr. Gould, in regard to the St. Joe Paper Company agreement, you had the right to settle that case on any basis that you deemed appropriate; is that a fair statement of your agreement?

A. I don't think so.

Q. Could you have settled that case and gotten a zero refund or a one dollar refund?

A. I did not, I regret to say, raise that issue you with Mr. Ball so I don't know. I would certainly have to — I would have had to have discussed it with Mr. Ball and Mr. Wheeland (phonetic) and report back.

Q. Was that part of the written agreement?

A. It wasn't part of the agreement but I would, as a matter of fact, as a matter of ethics, do that.

Q. As a matter of legal obligation, you had the right to settle the case at whatever you thought needed to be done?

MR. MARK: Objection, calls for a legal conclusion.

THE WITNESS: I don't think so. As a matter of legal obligation, I had the responsibility to request their authority to settle it. After all, they would receive part of the refund.

BY MR. ZIEGLER:

Q. Whatever that may have been, whether it was 50 cents or whatever.

How much refund was being sought for 1979?

A. $147,000.

Q. How much did you spend with Shutts & Bowen and Tax Adjustment Experts and everybody else that you would attribute to the 1979?

A. About $30,000.

Q. So, we are down to roughly $110,000 if you won the case a hundred percent for '79?

A. Let's put it this way, Mr. Ziegler. Mr. Ball and I felt the same way about the taxes.

MR. STETTIN: If he doesn't ask him, Judge, I will. I am dying to know what Mr. Ball feels about taxes.

(Laughter)

MR. MARK: I assume that is a waiver of the hearsay objection. Go ahead and answer it.

MR. ZIEGLER: Given the fact there is only 15 minutes left, we're not going to get involved with the land

Mr. Ball owned and why he wouldn't want to pay ad valorem taxes.

(Laughter)

BY MR. ZIEGLER:

Q. Did Shutts & Bowen ever raise or anybody else ever raise in the Circuit Court cases the failure to file the claims as a basis for the dismissal of any litigation or the determination of litigation? Is that part of the pleadings?

A. I am sorry, would you ask the question again, please?

Q. Has the issue of no taxes being due for the years of '84 and '85 ever been raised in the cases which you had an active participation in with Shutts & Bowen?

A. In the State Court, you mean?

Q. Yes, sir?

A. I don't know.

Q. You don't know whether it was ever made part of those pleadings?

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 85-3230-Civ-ATKINS

OLYMPIA & YORK FLORIDA EQUITY CORP. and
MIAMI CENTER JOINT VENTURE,

Appellants,

vs.

THE BANK OF NEW YORK,

Appellee.

MEMORANDUM OPINION

Olympia & York Florida Equity Corporation (O&Y), as a general partner of Miami Center Joint Venture (MCJV), appeals from the bankruptcy court's Confirmation Order confirming a Chapter 11 plan of reorganization initiated by five debtors. Competing plans of reorganization were submitted to the creditors who rejected the debtors' plans and adopted the Bank of New York's (Bank's) plan. O&Y/MCJV asserts that its claim was improperly classified under this plan.

Pursuant to 11 U.S.C. § 1129(b), the court may confirm a plan even though a class has rejected it if all other requirements of § 1129(a) have been fulfilled and "the plan does not discriminate unfairly, and is fair and equitable," with respect to that class. *Id.* O&Y/MCJV, as the only creditors in Class 7, voted to reject the plan. Therefore, the question presented is whether the plan fulfilled the requirements of § 1129(b).

I. STATEMENT OF THE CASE

A. The Parties and Their Respective Interests[1]

The five debtors include the Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, A Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Intercontinental Hotel (known as the "Pavillon" during the Gould group's ownership), retail space between them known as the "Podium," and an adjoining parking garage (collectively known as the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

MCJV is a Florida general partnership formed by debtor Gould and O&Y. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the existing Miami Center Project. Gould and O&Y, as the only partners, originally planned to construct Phases II and III of Miami Center on those lots, but disputes and arbitration between the two partners has precluded further construction or development.

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[1]Attached as court appendices I and II are two diagrams which set forth, graphically, the relationship between the various entities involved in this bankruptcy proceeding.

Over 400 other creditors have or had an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by the bankruptcy court, and have been active for the Holywell, MCLP, and MCC estates.

B. General Background Information

During the summer of 1984, the Bank initiated foreclosure proceedings in state court after declaring the debtor's mortgage loans on the Miami Center to be in default. The debtors quickly responded by filing their voluntary petitions for reorganization on August 22, 1984. During the Chapter 11 reorganization proceedings, the debtors and the Bank filed competing reorganization plans. The various creditors' committees and individual creditors rejected the debtors' plans and adopted the Bank's plan, although it was rejected by the impaired classes 7–9. This plan was then confirmed by the bankruptcy court over the Class 7 creditors' objection pursuant to 11 U.S.C. § 1129(b) (1979).

Several appeals were taken from the various bankruptcy proceedings. Two of these appeals were closely related to this one. In one, *Bank of New York v. Olympia & York Florida Equity Corp.*, No. 85-3430-Civ-ATKINS (June 23, 1986), the Bank sought reversal of a final judgment and related orders of the bankruptcy court in an adversary proceeding. The bankruptcy court found that certain lease agreements relating to furniture, fixtures, and equipment (FF&E) within the Miami Center project were "true leases." After reviewing the bankruptcy court's orders and the lease agreements, I affirmed. This action was significant because it formed the foundation for O&Y/MCJV's priority claims as the owner/lessor of the FF&E.

Another appeal went before Judge Aronovitz in which he was asked to review the same confirmation order as it related to other classes under the Bank's plan. After reviewing the confirmation order, he found that the bankruptcy court failed to enter clear and concise findings of fact and conclusions of law which would support its order; therefore, he remanded the case. Following the proceedings on remand, Judge Aronovitz affirmed the amended confirmation order as it related to those aspects of the Bank's plan on appeal before him.

Having resolved the "true lease" issue which established the nature of O&Y/MCJV's claim as to the FF&E, I carefully reviewed the confirmation order as it related to Class 7 of the plan. Like Judge Aronovitz, I found that it was necessary to remand the case for a more detailed order clearly elucidating the basis for the bankruptcy court's decision to place O&Y/MCJV's claim in class 7 of the plan.[2] On November 10, 1986, the bankruptcy court concluded its remand proceedings and entered its Order on Remand in which it adopted the proposed findings of fact and conclusions of law submitted by the Bank.[3] Thus, the initial

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[2]Remand proceedings were appropriate under *Wilson v. Huffman* (*In re Missionary Baptist Foundation of America*), 712 F.2d 206 (5th Cir. 1983). There, the district court evaluated the record to find sufficient findings of fact to satisfy each of *Mobile's* three elements for equitable subordination. The Fifth Circuit remanded the case saying:

> These findings, though perhaps inherent in the bankruptcy court's ruling, were not enunciated. Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings *by the bankruptcy court* on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder.

Id. at 212 (emphasis added).

[3]O&Y/MCJV challenges the propriety of the bankruptcy judge's verbatim adoption of the Bank's proposed findings and conclusions, and

(Footnote continued on next page)

Confirmation Order, as amended by the adoption, *nunc pro tunc*, of the explicit findings of fact and conclusions of law, constitutes the foundation for O&Y/MCJV's appeal.[4]

C. The Nature of the O&Y/MCJV Claim

The appeal before this court concerns only the rights and claims of MCJV, prosecuted by O&Y as as its general partner, and managing venturer relating to the FF&E leases. Originally, O&Y filed separate claims as a creditor; however, in conjunction with the Trustee's consent to entry of the final modified arbitration award, O&Y issued a formal release of all its own claims against debtor Gould.[5] O&Y/MCJV asserts that it has priority claims for the market value of the FF&E, the cumulative defaulted rental payments and late charges accrued from March 1, 1983 to

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(Footnote continued from previous page)
asserts that the "blanket adoption" of one party's findings and conclusions indicates that the court failed to conduct a thorough, independent analysis of the evidence and the law. While this practice has been severely criticized, *see Cabriolet Porsche-Audi v. American Honda Motor Company*, 773 F.2d 1193, 1198 n.2 (11th Cir. 1985), it is permissible. *See Anderson v. Bessemer City*, 470 U.S. ____, 105 S.Ct. 1504 (1985). Nevertheless, such a practice invites particularly close scrutiny of the findings in light of the record.

[4]On remand, the bankruptcy court correctly determined that it was not called upon to alter or enhance the record. I simply wanted a more detailed explanation concerning the basis for the court's approval of the plan. Therefore, the record, as it stood at the time of confirmation, must support the amended findings.

[5]O&Y and Gould initiated arbitration proceedings against each other in 1982 based upon their conflicting views regarding the operation of MCJV. The bankruptcy court permitted O&Y to pursue its rights under the relevant arbitration statutes and to proceed to an award in a court of competent jurisdiction, although it recognized that these proceedings could affect O&Y's and Gould's interests in MCJV. The final modified award was executed by the arbitrators on June 30, 1986 and entered as a judgment in the Florida Circuit Court on July 10, 1986.

October 10, 1985, and defaulted rental payments and late charges from October 10, 1985.[6]

II. DISCUSSION

This appeal presents many complex legal issues. Over 400 parties struggled through the bankruptcy proceedings, under that court's supervision, attempting to make the best of an undesirable situation. The plan has been substantially consummated, and appears to have been successfully implemented.[7] Nevertheless, O&Y/MCJV vehemently objects to the placement of its claim concerning the FF&E into class 7 of the plan. Conversely, the Bank argues that this classification was eminently correct, because it satisfied all statutory requirements under the Code.

A. Standard of Review

A district court must accord substantial deference to the bankruptcy court's findings of fact, and should reverse only when they are "clearly erroneous." *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206, 209 (5th Cir. 1983); Bankruptcy Rule 8013. Moreover, the bankruptcy court's balancing of equities in analyzing the plan's fairness is a factual process, therefore, the court's determination on this point is also subject to the "clearly erroneous" standard of review. *Danning v. General Motors Acceptance Corp. (In re Jules Meyers Pontiac, Inc.)*, 779

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[6]MCLP was supposed to make rental payments to MCJV under the lease agreement as of March 1, 1983. On October 10, 1985, the trustee transferred his interest in the FF&E to the Bank and its designated transferee.

[7]The claims classified under the plan from Class 1 to Class 6 have either been paid in full or funds have been reserved for the disputed items. In addition, in the most recent reports, the Liquidating Trustee estimated that approximately $3 million will be available to satisfy the remaining claims.

F.2d 480, 482 (9th Cir. 1985). Conclusions of law, however, are subject to plenary review. *Machinery Rental v. Herpel (In re Multiponics)*, 622 F.2d 709, 713 (5th Cir. 1980) (hereinafter referred to as "*Multiponics*").

B. Classification Under The Code

A Chapter 11 plan of reorganization may involve the sale of all or substantially all of the debtor's assets. 11 U.S.C.A. § 1123(b)(4) (1979). After all, one of the primary goals of the bankruptcy code is to effectuate an equitable distribution of the debtor's assets in satisfaction of its debts. *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 698 (5th Cir. 1977). To achieve the goal, the plan must group the claims or interests by classes. 11 U.S.C.A. §§ 1122, 1123 (1979)[*]; Bankruptcy Rule 3013. "The classes which hold priority claims must be specially organized and full payment

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[*]11 U.S.C.A. § 1122(a) provides:

> Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C.A. § 1123 provides (in pertinent part):

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall —
>
> (1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2) or 507(a)(7) of this title and classes of interests;
>
> (2) specify any class of claims or interests that is not impaired under the plan;
>
> (3) specify the treatment of any class of claims or interests that is impaired under the plan;
>
> (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim of interest;
>
> (5) provide adequate means for the plan's implementation . . . .

is mandatory although the payment may be deferred." R. Aaron, *Bankruptcy Law Fundamentals*, § 1.04 at 1-22 (1986) (footnote to citations omitted).

The Bank urges that its plan is acceptable because the classification of the MCJV lease claims is fair and equitable, and does not discriminate unfairly under § 1129(b).[9] Furthermore, the Bank asserts that O&Y/MCJV's claim is not substantially similar to other claims or interests, because 50% of any distribution on MCJV's claim would go to debtor Gould. However, having reviewed the facts and the relevant legal principles, I conclude that the Bank is incorrect.

Under the Bank's plan, O&Y/MCJV's claim cannot be paid until all claims filed by other creditors not affiliated with Gould have been satisfied. In effect, this classification structure means that even general unsecured creditors will be paid before O&Y/MCJV. To justify its treatment of the O&Y/MCJV claim, the Bank relies heavily on the factual premise that any distribution on the O&Y/MCJV claim will benefit Gould. However, this premise is incorrect. Any payment to O&Y/MCJV based on the FF&E leases *would not* benefit debtor Gould. In fact, Gould's share of any MCJV proceeds, rents, or profits are available to the liquidating trustee, since "*all* legal or equitable interests of the debtor in property as of the commencement of the case," or any "[p]roceeds, . . . rents, or profits of or from property

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[9] 11 U.S.C.A. § 1129(b)(1) provides:

> (b)(1) Notwithstanding section 510(g) of this title if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

of the estate . . ." become part of the bankruptcy estate. 11 U.S.C.A. § 541(a) (Supp. 1986) (emphasis added). *See also In re Wallen*, 43 Bankr. 408, 409 (D. Idaho 1984); *Houchen v. Gadberry (In re Gadberry)*, 30 Bankr. 13, 14 (C.D. Ill. 1983); *Dominican Fathers of Winona v. Dreske (In re Dreske)*, 25 Bankr. 268, 271 (E.D. Wis. 1982); *Don/Mark Partnership v. James B. Nutter & Co., (In re Don/Mark Partnership)*, 14 Bankr. 830, 832 (D. Colo. 1981); *cf. Missouri v. Eastern District of Arkansas*, 647 F.2d 768 (8th Cir. 1981) (court held that debtor's 2.3% fractional interest in deposited grain was sufficient to bring all property under the bankruptcy court's jurisdiction.) In short, any interest Gould held in MCJV became part of the bankruptcy estate upon the commencement of this case.

The Bank's position is incorrect for another reason. The plan must satisfy the requirements of code sections 1122, 1123, and 1129. While the Bank feels that the plan's classification structure fulfills all of these code requirements, I disagree.

Classification is simply the process under which the plan's proponent recognizes the legal differences between various claims and interests, and ranks them according to their nature and priority. *See Scherk v. Newton (In re Rocky Mountain Fuel Co.)*, 152 F.2d 747, 750–51 (10th Cir. 1945); *Seidel v. Palisades-on-the Desplains (In re Palisades-on-the-Desplaines)*, 89 F.2d 214, 217 (7th Cir. 1937). *See also* 11 U.S.C.A. § 1129(b) (1979). A party submitting a plan of reorganization has considerable discretion to determine the proper classification of claims and interests according to the unique factual circumstances presented; however, ". . . there must be some limit on a debtor's power to classify creditors in such a manner. The potential for abuse would be significant otherwise." *Teamsters National Freight Industry Negotiating Committee v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800

F.2d 581, 586 (6th Cir. 1986). The result is not surprising—considerable discretion is permitted in determining the proper classification of claims and interests; however, if the plan unfairly creates too many or too few classes, or violates basic priority rights, the court cannot confirm the plan. *See id.* Thus, classification principles cannot be employed to effectuate the subordination of valid claims. *See In re Martin's Point Limited Partnership*, 12 Bankr. 721 (Bankr. N.D. Ga. 1981); 11 U.S.C.A. § 1129(b).

One final point merits discussion under the "classification" issue. In its initial brief, the Bank argued that the MCJV claim is partially an equity interest. Yet, even if this assertion were true, it would not justify the subordination of a valid claim. *Id.* at 727 (". . . a valid claim of a creditor who is also an equity security holder is not to be subordinated to the claim of a creditor who is not also an equity security holder, but is to be treated equally.").

C. Claims of An Insider

In support of the plan's classification structure, the Bank emphasizes O&Y/MCJV's status as an insider.[10] The Bank argues that appellant's status is significant for two reasons. First, the Bank urges that insider creditors may not be given the same priority as unsecured creditors. *In re Toy & Sports Warehouse, Inc.*, 37 Bankr. 141, 152 (Bankr. S.D.N.Y. 1984) *In re Economy Cast Stone Co.*, 16 Bankr. 646, 651 (Bankr. E.D. Va. 1981). Alternatively, the Bank asserts that an insider creditor's claims must be closely scrutinized to determine whether equitable subordination is warranted. *Estes v. N&D Properties, Inc. (In re N&D Properties, Inc.)*, 799 F.2d 726, 731 (11th Cir. 1986);

[10]MCJV is an insider because it is a "partnership in which the debtor is a general partner." 11 U.S.C.A. § 101(28)(A)(ii) (Supp. 1986). O&Y is an insider because it is a "general partner of the Debtor." 11 U.S.C.A. § 101(28)(A)(iii) (Supp. 1986).

Multiponics, 622 F.2d 709, 714 (5th Cir. 1980). If the claimant is an insider, the party seeking equitable subordination need present only "material evidence of unfair conduct," and need not provide proof of, "more egregious conduct such as fraud, spoilation or overreaching." *Estes* at 731.

O&Y/CJV responds with two arguments. First, appellant contends that it is not an insider in the legal connotation of the term. Second, appellant assumes a "fallback" position arguing that the mere invocation of the term "insider," without more, does not serve to meet any standard or test required by law for equitable subordination.

The code is clear regarding the definition of an insider. In this case, it is beyond question that O&Y and MCVJ are insiders. See 11 U.S.C.A. § 101(28)A(ii) and (iii). However, the insider label is not sufficient, in and of itself, to justify the subordination of a claim. Insider's claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors. *See Estes* at 731; *Multiponics* at 713; *Huffman* at 212. Further, appellant asserts that even where the claimant is an insider the proponent of the plan bears the burden of presenting material evidence of inequitable and unfair conduct damaging the creditors. *See Multiponics* at 714; *Estes* at 731.

Two cases are particularly relevant regarding the subordination of an insider's claim. In *Huffman*, the Fifth Circuit found that "Huffman was an insider." *Id.* at 211. Nevertheless, the court indicated that the three-prong test of *Mobile* still had to be satisfied. "Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element

of the *Mobile* test, that the trustee has discharged his burden of proof thereunder." *Id.* at 212.

Very recently, the Eleventh Circuit examined this issue in *Estes*, and followed the teachings of *Mobile* and *Huffman*. The court expressly stated that three elements must be established before a claim may be equitably subordinated. *See Estes* at 731. Where the claimant is an insider, the trustee's burden of proof in establishing evidence of unfair conduct is somewhat lessened, but the claim is not automatically subordinated. *See id.*[11]

D. Equitable Subordination

The principle of subordination is firmly established in bankruptcy proceedings. This doctrine permits the court to lower the priority of a valid claim to achieve an equitable result when the claimant has been guilty of improper conduct.[12] 3 *Collier on Bankruptcy* ¶ 510.02 (15th Ed. 1986). Although the doctrine was judicially created,[13] it has now been codified within the bankruptcy code. Currently, the relevant provision is found at 11 U.S.C.A. § 510(c) which provides:

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[11]Significantly, I note that Congress specifically rejected a provision which would have automatically subordinated certain insider claims as a matter of law. *See* S. Rep. No. 989, 95th Cong., 2 Sess. 74 (1978); H.R. 31, 95th Cong., 1st Sess. (1975).

[12]Subordination is not the same as disallowance. "If a creditor's misconduct has been directed toward the debtor . . . the claim . . . is disallowed." 3 *Collier on Bankruptcy*, ¶510.02 (15th Ed. 1986). Subordination is employed when a claim is valid, but the claimant's conduct is such that equitable considerations require it to be paid after other claims have been satisfied. *See id.*

[13]Under the previous Act, courts subordinated creditor's claims based upon the bankruptcy court's grant of equitable jurisdiction. *See Pepper v. Litton*, 308 U.S. 295 (1939).

§ 510 Subordination

* * *

(c) Notwithstanding subsection (a) and (b) of this section, after notice and a hearing, the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest, or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

Section 510(c) authorizes subordination when the court finds that an equitable remedy is required. Established case law, however, continues to be significant because § 510(c) indicates that its application should follow equitable principles. *See* 3 *Collier on Bankruptcy* ¶ 510.01 (15th Ed. 1986). To resolve subordination situations, the Fifth Circuit established a three part test to determine when a claim or interest should be subordinated. See *Mobile* at 700. This test has been expressly adopted by the Eleventh Circuit. *See Estes* at 731. The three elements of the test include:

(1) that the claimant has engaged in inequitable conduct;

(2) that the conduct has injured creditors or given unfair advantage to the claimant; and

(3) that subordination of the claim is not inconsistent with the Bankruptcy Code.

Id. (citation omitted).

In proving the elements for equitable subordination, one must first determine the status of the claim holder.

> The burden and sufficiency of proof required are not uniform in all cases. Where the claimant is an insider or a fiduciary, the trustee bears the burden of presenting material evidence of unfair conduct. Once the trustee meets his burden, the claimant then must prove the fairness of his transactions with the debtor or his claim will be subordinated. If the claimant is not an insider or fiduciary, however, the trustee must prove more egregious conduct such as fraud, spoilation, or overreaching, and prove it with particularity.

Id. (citations omitted). Additionally, the trustee, or other moving party, must show the extent of any inquiry or unfair advantage to determine the extent to which the claim should be subordinated. The claim should only be subordinated to the extent necessary to offset the harm caused by the unfair conduct. *See Benjamin,* at 701. "For example, if a claimant guilty of misconduct asserts two claims, each worth $10,000, and the injury he inflicted on the bankrupt or its creditors amounted to $10,000, only one of his claims should be subordinated." *Id.* at 701. Finally, the evidence must show which creditors were disadvantaged, because a valid claim should only be subordinated to the claims of the disadvantaged creditors. *See Estes* at 732–33.

In this case, the bankruptcy court appears to have relied upon three facts to fulfill *Mobile's* tripartite test. First, the court imputed Gould's acts of misconduct to O&Y/MCJV as a matter of partnership and agency principles. Second, the court found that O&Y/MCJV was responsible for MCLP's undercapitalization. Third, the court found that O&Y

substantially contributed to MCJV's and Gould's financial difficulties, to the detriment of other creditors, by failing to provide or arrange for the financing of Phases II and III of the Miami Center.

O&Y/MCJV challenges all of these facts and asserts that there is no semblance of proof of wrongful conduct of the claimant/appellant affecting the debtors' creditors. First, O&Y/MCJV argues that all of Gould's acts of misconduct were outside the course and scope of the partnership's business. In fact, Gould's conduct was *against* O&Y and the partnership's interest. Therefore, appellant urges that Gould's misconduct cannot be used to subordinate its claim. Second, O&Y/MCJV suggests that the theory of undercapitalization of MCLP is outrageous and incomprehensible. Appellant insists that MCJV was the victim of, not a contributor to, MCLP's poor financial situation. Finally, appellant states that everyone recognized that the construction of phases II and III of the Miami Center would have subjected Gould to even greater losses and further indebtedness. Thus, appellant's failure to provide financing for further development could not have injured any of the debtor's creditors.

After carefully considering the facts, I conclude that the evidence was insufficient to satisfy the elements of equitable subordination. First, I find that the court erred when it imputed Gould's acts of misconduct to O&Y/MCJV. These acts were clearly outside the ordinary course of the business of the partnership and not authorized by O&Y. *See Fla. Stat. Ann.* § 620.62 (1977).[14] Second, I simply cannot accept

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[14] *Fla. Stat. Ann.* § 620.62 (1977) reads as follows:

Partnership bound by partner's wrongful act. — When loss or injury is caused to a person, not a partner in the partnership, or any penalty is incurred by a wrongful omission *of a partner acting in the ordinary course of the business of the partnership*

(Footnote continued on next page)

appellee's theory of undercapitalization. Perhaps the best indication that the FF&E lease was valuable was that the trustee was required to obtain title to the FF&E under the plan. Therefore, it is unreasonable to believe that the valuable FF&E lease agreements injured any of the debtor's creditors, even if I could somehow attribute MCLP's financial situation to O&Y/MCJV. Finally, I find that insufficient evidence was offered to prove that O&Y's failure to provide further financing hurt any creditors or gave O&Y an unfair advantage. Under the circumstances, O&Y's decision seems sound.

III. CONCLUSION

After carefully reviewing the amended confirmation order, I find that the court erred in confirming the plan which placed the O&Y/MCJV lease claim in class 7 beneath even the unsecured creditors. The plan, as structured, is not fair and equitable with respect to the class 7 creditor. None of the theories presented by the Bank justify the subordination of O&Y/MCJV's claim. I must, therefore, remand the case so that the bankruptcy court can determine O&Y's share of the claim.

On remand, the bankruptcy court must resolve two issues. First, the bankruptcy court should determine the value of the lease claim. Then, it should determine the respective interest in this claim held by O&Y and the bankruptcy estate (in lieu of debtor Gould).[15]

(Footnote continued from previous page)

or with the authority of his copartners, the partnership is liable for it to the same extent as the partner so acting or omitting to act. (emphasis added).

[15]O&Y and the Bank continue to dispute the interest each party holds concerning the lease claim. The bankruptcy court must determine what effect, if any, the arbitration proceeds have had which would alter the general partners' 50% interests.

Because the parties are in substantial disagreement regarding the payment of the claim, I feel compelled to resolve this point. O&Y should be paid:

(1) First, from the cash which remains available to the trustee;

(2) Second, from any property controlled by the trustee including Gould's interest in MCJV; and

(3) Finally, from the surety bond provided by the Bank to guarantee O&Y's payment under the plan.

For all of the reasons expressed in this opinion, the order of confirmation is reversed and remanded for further considerations not inconsistent with this opinion.

DONE AND ORDERED at Miami, Florida, this 24 day of March, 1987.

/s/ C. CLYDE ATKINS
UNITED STATES DISTRICT JUDGE

cc: John Kozyak, Esq.
Albert I. Edelman, Esq.
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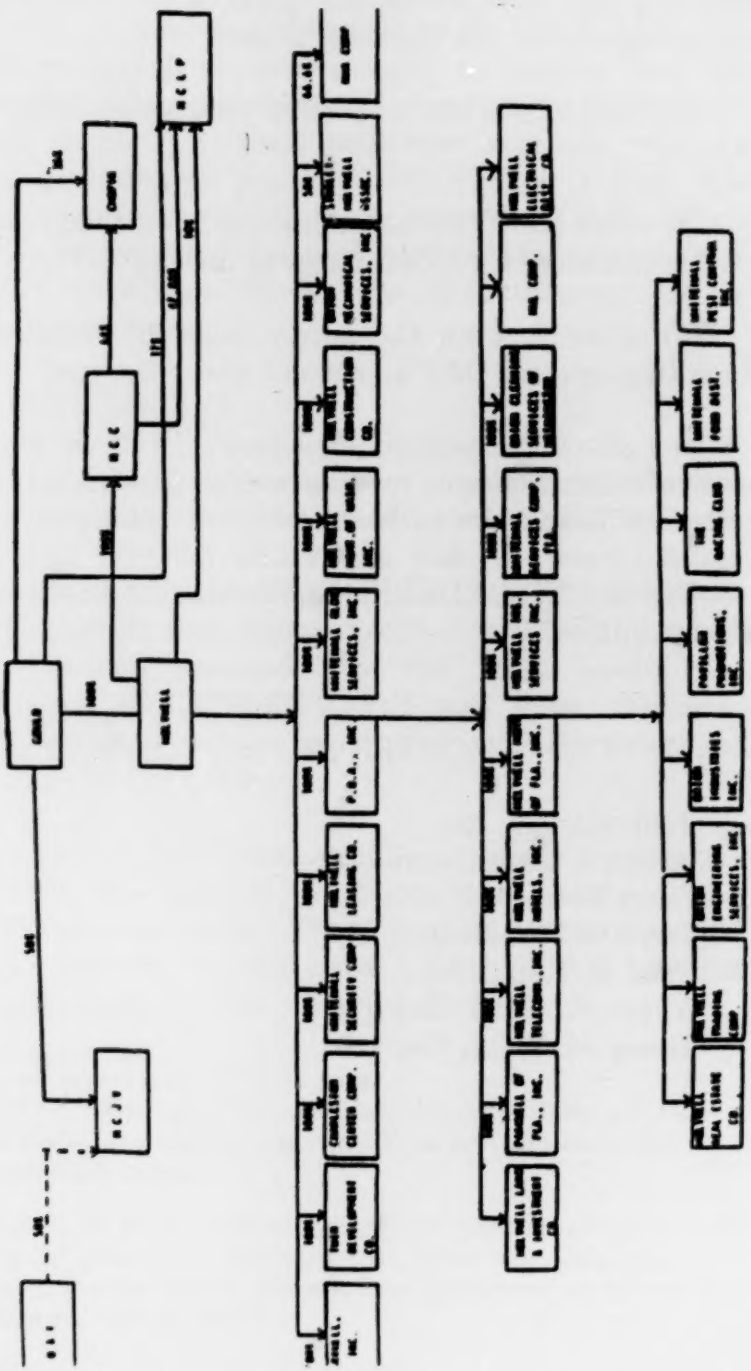
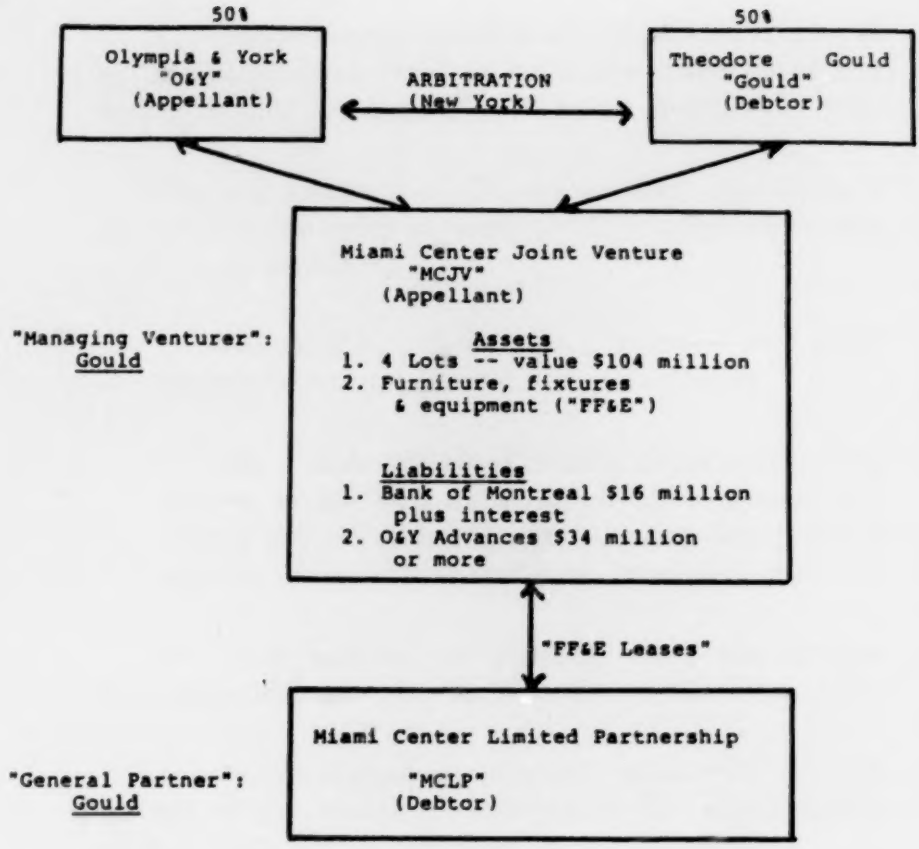
Court Appendix I



Court Appendix II



APPENDIX C

11 U.S.C. Section 541(a): Property of the estate

(a) The commencement of a case under under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) An interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. Section 945: **Continuing jurisdiction and closing of the case**

(a) The court may retain jurisdiction over the case for such period of time as is necessary for the successful execution of the plan.

(b) Except as provided in subsection (a) of this section, the court shall close the case when administration of the case has been completed.

11 U.S.C. Section 1104(a): **Appointment of trustee or examiner**

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including, fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. Section 1129: **Confirmation of plan**

(a) The court shall confirm a plan only if all of the following requirements are met:

* * *

(3) The plan has been proposed in good faith and not by any means forbidden by law.

* * *

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

* * *

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a government unit, the court may not confirm a plan if the principal

purpose of the plan is the avoidance of taxes or the avoidance of section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

11 U.S.C. Section 3020(d): **Deposit; Confirmation of Plan**

(d) Retained power

Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate.

11 U.S.C. Section 9019: **Compromise and Arbitration**

(a) Compromise

On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

26 U.S.C. Section 6012(b): **Persons required to make returns of income**

(a) General rule.—Returns with respect to income taxes under subtitle A shall be made by the following:

* * *

(b) Returns made by fiduciaries and receivers.—

(1) Returns of decedents.—If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor,

administrator, or other person charged with the property of such decedent.

(2) Persons under a disability.—If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.

(3) Receivers, trustees and assignees for corporations.—In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts.—Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

(5) Joint fiduciaries.—Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to

enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.

Sup.Ct.R. 10 Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.